APPENDIX A

BEFORE THE HEARING TRIBUNAL OF THE
STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS

FEP 69-681

PAUL D. GUTWEIN

v.

EASTON PUBLISHING COMPANY

Order

Pursuant to Rules 11 and 13 of the Rules of Procedures of the Maryland Commission on Human Relations, it is hereby ordered this 8th day of March, 1973 that the attached Opinion of the Hearing Tribunal in the above captioned case is hereby adopted and issued as the Order of the Commission the provisions of which are to take effect immediately upon receipt.

Relief to Mr. Gutwein is to be paid no later than March 23, 1973.

/s/ JACOB J. EDELMAN
Jacob J. Edelman, *Chairman*

Decision of the Hearing Tribunal

The above captioned matter was brought for hearing before a duly constituted Hearing Tribunal of the Maryland Human Relations Commission on 12/11/72 at Easton, Maryland.

The original complaint in the matter was filed 8/20/69 alleging racial discrimination in the employment termination effective 8/21/69. The evidence is uncontested that the Complainant was notified 8/11/69 of his discharge. Respondent paid two (2) weeks severance pay unto the Complainant although under no legal obligation thereon. Respondent has raised objections to the filing of the complaint prior to final date of unemployment. The crucial

issue however, is the termination which was effectuated 8/11/69 and the cogent reasons motivating same. The Tribunal finds no irregularities in the proceedural sequence of events henceforth set forth.

An amended complaint was filed by the Complainant 11/3/72 adding to the original charges:

A. Maintenance of sex discrimination policies by virtue of my termination.

B. Maintenance of racially discriminatory hiring and recruiting practices.

At the hearing on 12/11/72 after proper motion by the Respondents Counsel the Tribunal dismissed the Count B relating to the maintenance of racially discriminating hiring and recruiting practices. The Tribunal deferred ruling on Count A, to wit "the maintenance of sex discrimination policies by virtue of my termination". Respondent has raised numerous objections to the amended complaint including but not limited to the timing, due process, etc. The Tribunal seriously questions the need and necessity of amending a complaint some three years subsequent to termination of employment bringing matters before the Tribunal not certified for public hearing pursuant to Article 49 B, Section 16 and the applicable provisions of due process relating to an administrative hearing. However in this case the evidence presented being insufficient to sustain the charge enumerated in Count "A" of the amended complaint be and is hereby dismissed. Any further discussion of the issues in view of this ruling renders the questions raised as a moot problem.

The Respondent has raised objections to the jurisdiction of the Maryland Human Relations Commission as being inapplicable to this case; however the weight of the authorities, EEOC decision amply demonstrate that racial discrimination however manifested cannot and will not be tolerated.

Numerous witnesses, exhibits, and a tape interview were heard and examined by the Tribunal. From the evidence the Tribunal determines as a finding of fact inter alia that the complainant was discharged for his association and relationship with his black girl friend. Racial discrimination being a cause for the termination, said act being prohibited by the provisions of Article 49 B, Section 19 A, the complainant be and is hereby entitled to an award of damages.

Numerous items of damages were presented to the Tribunal, including alleged losses on a purchase/sale of a truck, rents, gas, oil, electric and lost wages. No evidence of depreciation, wear and tear, marketability effect of psychedelic paint, etc. were presented and to award damages for the truck transaction would be indulging in speculation at the expense of the Respondents. Inasfar as rent, gas and electricity is concerned, the evidence indicates the complainant received the benefit of these experditures and are therefore accordingly disallowed. Consequential damages be and are restricted to items that are directly related to the wrongful discharge.

The Complainant is awarded damages for six (6) weeks loss of pay, giving credit to the Respondent for the two (2) weeks severance pay, in the amount of $557.16, plus $50.00 for moving expenses for a total of $607.16.

Respectfully submitted,

/s/ Eloise C. Hall
/s/ Ernest H. Lyte
/s/ Paul W. Barnett,
Chairman of Hearing Tribunal

APPENDIX B

IN THE CIRCUIT COURT FOR TALBOT COUNTY

No. 4096 Law

PAUL D. GUTWEIN, ET AL.

v.

EASTON PUBLISHING COMPANY

Opinion and Order

The Easton Publishing Company appeals from a finding of the State Human Relations Commission that the employment of Paul D. Gutwein as reporter-assistant editor of its weekly newspaper was terminated upon racial grounds, in violation of Article 49B, and awarding Gutwein damages therefor.

The factual situation is extremely simple and I find, as did the Commission, that there was substantial, competent and material evidence (Art. 41, Sec. 255 g) that a major reason for Gutwein's termination was the employer's discovery that (he being white) his fiancee was black. Since Sec. 19(a) of Art. 49B only proscribes employment discrimination on account of "such individual's race", the short, simple, and obvious answer to Gutwein's complaint of violation is that the termination involved not his own race, but rather his fiancee's. It was conceded by the Appellees in argument that, in a reverse situation, a black employee who had a white fiancee would similarly have been terminated, so that the trigger of termination would clearly not be "such individual's race". Indeed, had his race been the factor, Gutwein would probably not have been employed in the first place.

The Appellees, however, submit that a proper interpretation of the law does not restrict it to direct racial implications, and that it reaches as well indirect and consequential racial involvement. The Commission found the proper construction to be "that racial discrimination however

manifested cannot and will not be tolerated". Zeal and a sense of mission, however, cannot be substituted for ordained intent and purpose, and the law itself does not seem to warrant such an interpretation.

The very enactment of the law indicates a legislative recognition that we do not as yet have a millennial or absolute equality. An analysis of its provisions reveals built-in limitations of purpose, i.e., it disavows employment quotas, it permits purposeful and warranted discriminations, and allows disregard of classifications in instances of intrinsic occupational qualifications. It has since been amended to exempt specifically requirements in dress and grooming. It demands and provides only that an employee's class shall not ipso facto be a factor in his employment (with the defined exceptions). It nowhere implies any advantage nor does it grant any special privilege.

The Appellant points out that a reporter-assistant editor holds a sensitive position as contrasted to a typesetter or proofreader, that a respect for the public mores and customs is necessary for his rapport and acceptability in the community, and that without these his effectiveness is limited or destroyed. The Appelles, in response, submit that even such peripheral and coincidental considerations are proscribed by the law, and if there is any taint of discrimination it permeates the employment ab initio. With this I cannot agree. Had this complainant been a gay libber legally married to another man, would he have been able to claim sexual discrimination? Were he an active partisan and public protagonist in the present Middle East confrontation, would his termination be a religious discrimination? The questions almost answer themselves—it is not his sex, race or religion, but what he is doing, that is the crux of the matter.

With this perspective the issue here comes clearly into focus, and the many authorities cited by the Appellees lose relevance, because we are not primarily concerned with

racial discrimination at all. Whatever it be called, the factor involved is one of those indescribable, imprecise, or even amorphous, considerations which are a part of every employment to a greater or less degree. How much more relevant it might be than technical skill in the subject position, as contrasted to a typesetter or proofreader, is not significant. What is important is that this factor was, and could have been at the time of employment, a legitimate and controlling reason for preferment, entirely apart from any question of "such individual's race"—or religion, or ancestry, etc. The purpose of the law (Sec. 17) is "to assure all persons equal opportunity * * * regardless of race," etc. It clearly means that, while device or contrivance may not be used to defeat it, neither may its guise be used for defiance or reform of established social and economic systems. It is a shield of protection and not a sword of conquest. I find, therefore, that the present termination was not discriminatory and that the employer has not been guilty of an unlawful employment practice.

In addition to the defense of lack of statutory jurisdiction of the subject-matter here, the Appellant offered an extensive defense on the merits based upon professional incompetency. The Commission made no specific findings thereon, but in view of the above-stated conclusion, that question is not reached and remand is unnecessary. The Appellant also urged as a plea in bar that the complaint was improperly filed the day before duty ceased and severance pay commenced. It is undisputed, however, that definite notice of termination, on an unspecified future date, had been given ten days previously. This contention is unsound, since the cause for complaint arose at the time of notice and, in many cases, would be the most efficacious time for action.

A corollary of the basic conclusion herein is that, through failure of proof of any redressible injury, compensatory damages could not have accrued. However, in the vein of the holding of the Court of Appeals in Ferguson v. United

Parcel Service, 270 Md. 202, the allowance of such in this case would nonetheless be improper. There was no evidence of how hard the employee sought employment, or where, or even what kind (he was a novice in news work), and his bare statement that he "was looking for work for approximately eight weeks" is not such substantial evidence as will support the decision under review, and this is also true of the award for moving expenses.

It Is Thereupon, this 9th day of January, 1974, by the Circuit Court for Talbot County, Ordered, that the decision of the Commission herein is reversed and the complaint dismissed.

/s/ James A. Wise
Judge

APPENDIX C

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1974

No. 19

Paul D. Gutwein et al

v.

Easton Publishing Company

Before, Murphy, C. J., Singley, Digges, Levine, Eldridge, O'Donnell, JJ.

Opinion by Murphy, C. J.

Filed: October 8, 1974

This appeal from an order of the Circuit Court for Talbot County reversing an order of the Maryland Commission on Human Relations raises important questions regarding the reach of the Commission's jurisdiction and the scope of its enforcement powers.

Maryland Code (1972 Repl. Vol.) Art. 49B entitled "Human Relations Commission" makes provision in § 1 for a twelve-member Commission appointed by the Governor with the advice and consent of the Senate. The Commission is authorized by § 3 "to make such surveys and studies concerning human relations, conditions and problems as it may determine, and to promote in every way possible the betterment of human relations"; to recommend legislation; and to hold an investigatory hearing "[w]henever any problem of racial discrimination arises . . . [and] to resolve the problem promptly by the gathering of all the facts from all the interested parties and making such recommendations as may be necessary." Discrimination in places of public accommodation is made unlawful by § 11; discrimination in employment is prohibited by § 19; and discrimination in housing is prohibited by § 22. Section 12 provides for the filing and issuance of complaints by and with the Commission, alleging discrimination prohibited by the provisions of Article 49B. Section 13 requires that the Commission investigate such complaints and if probable cause is found to believe that a discriminatory act has been committed, the Commission is enjoined "to eliminate the discrimination by conference, conciliation and persuasion." Section 14 provides that, failing voluntary agreement to eliminate the discrimination, the Commission shall hold a public hearing and require the respondent to answer the charges set forth in the complaint. Section 14(c), authorizing the Commission to issue "Cease and Desist" orders, provides:

> "If upon all the evidence, the Commission finds that the respondent has engaged in any discriminatory act within the scope of any of these subtitles, it shall so state its findings. The Commission thereupon shall issue and cause to be served upon the respondent an order requiring the respondent to cease and desist from the discriminatory acts and to take such affirmative action as will effectuate the purposes of the particular subtitle."

Section 15 authorizes the Commission to institute litigation in the equity courts to compel compliance with its orders.

In pursuance of the provisions of Article 49B, the apellant Gutwein, a white male, filed a complaint with the Commission on August 20, 1969, alleging that his employer, appellee Easton Publishing Co. (Easton), had unlawfully terminated his employment as a news reporter when it learned that his fiancee was black.[1] Following an investigation and evidentiary hearing, the Commission concluded, by order dated March 8, 1973, that Easton had unlawfully discharged Gutwein from his employment in violation of the racial discrimination provisions of § 19(a) of Article 49B, which provide:

> "It shall be an unlawful employment practice for an employer:
>
> "(a) To fail or refuse to hire or *to discharge any individual*, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race*, color, creed, sex, age or national origin." (Emphasis added.)

The Commission found from the evidence adduced before its hearing tribunal that Gutwein "was discharged [from his employment] for his association and relationship with his black girl friend." The Commission ordered that Easton pay Gutwein the amount of $207.16, representing six weeks' loss of pay, and $50 for moving expenses.

On appeal by Easton, pursuant to the provisions of the Administrative Procedure Act, Article 41, §§ 244-256A, the circuit court reversed the Commission's order, holding that because § 19(a) only proscribed employment discrimination on account of "such individual's race," and since

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[1] Easton employed Gutwein as a reporter for its weekly newspaper, the *Easton Star Democrat*, on August 4, 1969. His employment was terminated on August 21, 1969.

Gutwein's discharge from Easton's employ "involved not his own race, but rather his fiancee's," the provisions of the section were not applicable to Gutwein's termination. The court further held that while there was substantial evidence "that a major reason for Gutwein's termination was the employer's discovery that (he being white) his fiancee was black," the termination "was not discriminatory and . . . the employer has not been guilty of an unlawful employment practice." The court concluded that since Gutwein failed to prove any redressable injury, "compensatory damages could not have accrued."

The Commission and Gutwein each appealed, raising these questions:

1. Was the finding of an administrative agency that a white male was terminated from his employment because of his interracial association with a black female based upon substantial evidence?
2. Can a white male lawfully be terminated from his employment because of his interracial association with a black female?
3. Does the Human Relations Commission possess authority to award compensatory damages upon a finding of employment discrimination?

(1)

The evidence before the Commission concerning the reason for Gutwein's termination from Easton's employment was in sharp conflict. There was substantial evidence to demonstrate that Gutwein's discharge was triggered by improper job performance, poor work ability, a slovenly appearance, a bad attitude, and deficiencies in his personal conduct unassociated with the race of his fiancee. There was other evidence, equally substantial if believed, tending to show that Gutwein's employment was ended when Easton learned of his relationship with his black fiancee in the town of Easton. The Commission found as a fact from the evidence adduced at the hearing

that it was the latter reason which precipitated Easton's action in terminating Gutwein's employment. Being supported by substantial evidence, the Commission's finding should have been accepted by the circuit court. *See Grosman* v. *Real Estate Comm'n*, 267 Md. 259, 297 A.2d 257 (1972); *Bernstein* v. *Real Estate Comm.*, 221 Md. 221, 156 A.2d 657 (1959); Article 41, § 255.

(2)

As heretofore indicated, § 19(a) makes it an unlawful employment practice for an employer "to discharge any individual . . . because of such individual's race . . . ." Appellants maintain that this provision reaches racial discrimination however manifested and protects all persons from discriminatory practices. Easton maintains that the lower court was correct in concluding that it was the race of Gutwein's fiancee that triggered his termination, and not his own race, and that consequently § 19(a) has no applicability to the facts of this case. We think instances of discrimination in employment involving, as here, the termination of a white complainant's employment because of his association with his black fiancee are plainly within the contemplation and coverage of § 19(a). The race of Gutwein's fiancee was manifestly not the only reason for his dismissal; rather his employment was terminated because he was white and was intimately associated with a black woman, a relationship so offensive to Easton as to cause it to discharge Gutwein from his position.[2]

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[2] Language identical to that in Section 19(a) is contained in Title VII of the Federal Civil Rights Act, 42 U.S.C.A. 2000e-2(a). The United States Equal Employment Opportunity Commission has held that a white employee's interracial associations are protected by the statute. *See* EEOC Decision No. 71-1902, decided April 28, 1971, 3 FEP 1244; EEOC Decision No. 71-969, decided December 24, 1970. *See also* Langford v. City of Texarkana, 478 F.2d 262 (8th Cir. 1973).

(3)

The enforcement powers vested in the Commission, contained in § 14(c), authorize it to issue "an order requiring the respondent to cease and desist from the discriminatory acts and to take such affirmative action as will effectuate the purposes of the particular subtitle." The appellants claim that the purpose of this provision is "to make whole victims of discrimination as well as insure against future unlawful conduct." They contend that the Commission's authority to order "affirmative action" is identical to that contained in virtually all civil rights laws, state and federal, and that such laws have been interpreted "expansively" to permit the payment of compensatory damages to victims of discrimination.

We note at the outset that the "affirmative action" provision in § 14(c) is tied to "the purposes of the particular subtitle." Section 17 of Article 49B sets forth the purpose of the subtitle on "Discrimination in Employment" as follows:

> "It is hereby declared to be the policy of the State of Maryland, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the State's trade, commerce and manufacturers *to assure all persons equal opportunity in receiving employment* and in all labor management-union relations regardless of race, color, religion ancestry or national origin, sex, or age, *and to that end to prohibit discrimination in employment* by any person, group, labor organization, organization or any employer or his agents." (Emphasis added.)

Neither § 17 or § 14(c) speaks in terms of remedying the "effects" of employment discrimination, or of preventing economic loss, redressing individual rights or compensating victims of discrimination. Section 17 is plainly couched in prohibitory and not compensatory terms.

Unlike § 14(c) of Article 49B, Title VII of the Federal Civil Rights Act has a separate enforcement provision (42 U.S.C.A 2000e-5(g)) relating to discriminatory employment practices and the remedies authorized therein are court-enforced. The federal law provides:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and *order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement, or hiring of employees, with or without back pay* (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate . . . .*" (Emphasis added.)

While the federal statute specifically provides for back pay awards, federal courts are divided over the question whether the statute authorizes payment of other compensatory damages. Those courts which hold that Title VII authorizes compensatory damages do so on the basis that the statute was designed "to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination," *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90, 96 (3d Cir. 1973) or "to put the aggrieved party in the same position he would have been but for the defendant's illegal interference with the employer-employee relationship," *Tidwell* v. *American Oil Co.*, 332 F.Supp. 424, 437 (D. Utah 1971). Those federal courts which hold that Title VII does not authorize compensatory damages have concluded that the statute grants only equitable relief, *Loo* v. *Gerage*, 374 F.Supp. 1338, 1341-42 (D. Hawaii 1974); or that an examination of the legislative history of the statute and of its legislative model —the National Labor Relations Act, 29 U.S.C.A. § 160(c), and the damage provisions of the Fair Housing Act of 1968, 42 U.S.C.A. § 3612, demonstrate that Congress did not

intend a damage remedy, *Van Hoomissen* v. *Xerox Corp.*, 368 F.Supp. 829, 835-38 (N.D. Calif. 1973); or that "the omission of any such provision in a statute which sets forth the types of relief which may be afforded to an aggrieved person must be deemed to have been intentional," *Howard* v. *Lockheed-Georgia Co.*, 372 F.Supp. 854, 856 (N.D. Ga. 1974).[3]

State statutes specifically authorizing the administrative agency to make an award of compensatory damages for wrongful discrimination have been construed in some instances to sanction money damage awards for mental anguish and humiliation.[4] In *State Commission for Human Rights* v. *Speer*, 29 N.Y.2d 555, 324 N.Y.S.2d 297 (1971), a housing discrimination case, the Court of Appeals of New York held that the statute empowering the Commission to require respondents "to take such affirmative action, including (but not limited to) . . . awarding of compensatory damages to the person aggrieved by such [unlawful] practice, as, in the judgment of the division, will effectuate the purposes of this article," sanctioned damage awards for mental anguish. In Massachusetts, the Commission is authorized by statute in housing discrimination cases to "award the petitioner damages not to exceed one thousand dollars . . . ." This statute was held to authorize an award of money damages for humiliation in *Massachusetts Commission Against Discrimination* v. *Franzaroli*, 357 Mass. 112, 256 N.E.2d 311 (1970). Other states having statutes evidencing a clear legislative intent to eliminate the effects of discrimination or specifically sanctioning back pay awards have construed such statutes

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[3] One federal court has said Title VII authorizes punitive but not compensatory damages. Tooles v. Kellogg Co., 336 F. Supp. 14 (D. Neb. 1972).

[4] Seven states and the District of Columbia *specifically* authorize courts or administrative agencies to make money awards for damages suffered as a result of unlawful discrimination. *See* BNA, Fair Employment Practice Manual, § 451.

to authorize compensatory damages. In *A. P. Green Services Division of Bigelow-Liptak Corp.* v. *State Fair Employment Practices Commission*, Ill. App. 2d , 312 N.E.2d 314 (1974), language empowering the Commission to order the respondent "to take such affirmative or other actions with respect to the complainant as will eliminate the effect of the practice originally complained of," was held to sanction compensatory damages. In *Williams* v. *Joyce*, 4 Or. App. 482, 479 P.2d 513 (1970), the court, viewing similar statutory language, coupled with an extensive recitation of purposes relating to the rights, health and dignity of the individual complainant, held in a housing discrimination case that the Commission had power to award damages not only for out-of-pocket expenses but for mental anguish.[5]

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[5] ORS ch. 659 provides that the commissioner shall issue "an appropriate cease and desist order against any respondent found to have engaged in any unlawful practice charged." ORS 659.010 spells out what is meant by a cease and desist order:

> "(2) 'Cease and desist order' means an order * * * issued to eliminate the effects of any unlawful practice found, addressed to a respondent requiring him to:
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> "(a) Perform an act * * * reasonably calculated to carry out the purposes of ORS 659.010 to 659.110, eliminate the effects of an unlawful practice found, and protect the rights of the complainant and other persons similarly situated * * *."

ORS 659.022 states the purposes of ORS 659.010 to ORS 659.110, some of which are to "insure human dignity" and "to protect [the victim's] health * * * from the consequences of intergroup hostility, tensions and practices of discrimination." It says that:

> "* * * To accomplish this purpose the Legislative Assembly intends by ORS 659.010 to 659.110 to provide:
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> "* * *
>
> "(2) An adequate remedy for persons aggrieved by certain acts of discrimination because of race, religion, color, sex or national origin or unreasonable acts of discrimination in employment based upon age."

In *Jackson* v. *Concord Co.*, 54 N.J. 113, 253 A.2d 793 (1969), a housing discrimination case, the Supreme Court of New Jersey, considering a statute similar to the federal law,[6] concluded from the specific mention of a back pay award and a legislative intent to create an effective enforcement agency that money damage awards were permitted.[7] In 1973, this damage remedy was held to authorize a monetary award for pain and suffering. *Zahorian* v. *Russell Fitt Real Estate Agency*, 62 N.J. 399, 301 A.2d 754 (1973).

Other state courts viewing enforcement provisions practically identical to those contained in the New Jersey statute have concluded that their statutes do not empower a Commission to award money damages for unlawful discrimination. In the most recent, *Ohio Civil Rights Com-*

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[6] The enforcement provisions of most state civil rights laws or fair employment practice acts follow the federal model by delineating the meaning of "affirmative action" and specifically sanctioning back pay awards.

[7] The New Jersey statute provides:

> "If, upon all evidence at the hearing the director shall find that the respondent has engaged in any unlawful employment practice or unlawful discrimination as defined in this act, the director shall state his findings of fact and conclusions of law and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice or unlawful discrimination and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership, in any respondent labor organization, or extending full and equal accommodations, advantages, facilities, and privileges to all persons, as, in the judgment of the director, will effectuate the purpose of this act, and including a requirement for report of the manner of compliance. The director shall have the power to use reasonably certain bases, including but not limited to list, catalogue or market prices or values, or contract or advertised terms and conditions, in order to determine particulars or performance in giving appropriate remedy. * * *"

mission v. *Lysyj*, 38 Ohio St. 2d 217, 313 N.E.2d 3 (1974), a housing discrimination case, the Supreme Court of Ohio said:

> "The authority to take 'affirmative action' may well include extensive powers to effectuate the purpose of the Civil Rights Act, but, under existing statutory language, those powers are to be directed towards ending the unlawful discriminatory practice and securing compliance with the cease and desist order. If the General Assembly had intended to authorize the commission to grant compensatory or punitive damages, it would have been a simple matter to explicitly so provide, as was done elsewhere in the Act."

In *Zamantakis* v. *Commonwealth Human Relations Commission*, 10 Pa. Comm. 107, 117, 308 A.2d 612, 616 (1973), it was said:

> "As we view our role in this case, on this issue, we must determine whether *our* Legislature intended *our* Commission to award compensatory damages for 'humiliation and mental anguish.' We first note that in the Pennsylvania statute, there is no specific legislative language authorizing the Commission to award such damages. Next, we note that the statutorily provided proceeding is directed to be expeditious and informal, as are most administrative procedures. There are none of the formal trappings, evidentiary protections, and strict procedures of a court of law. In addition, the members of the Commission necessarily need not be trained or learned in the law. As so often happens in an administrative proceeding, the Commission and its employes are the investigators, the prosecutors, the judges and jury. On balance, this results in an unduly heavy force on the side of the proponents of *damages*. Traditionally, damages, in this Commonwealth, have been a matter for courts of law, under an adversary system of justice, and therefore unless the Legislature clearly authorizes the Commission to award damages, we cannot extend to it such authority by judicial fiat, nor can we broaden the scope of the Commission's authority into a full scale lawsuit." (Emphasis in original.)

And in *Iron Workers Local No. 67* v. *Hart*, 191 N.W.2d 758, 767 (Iowa 1971), the court said:

> "The right granted Commission to allow back pay for employees ordered hired, reinstated or upgraded is only incidental to affirmative action equitably decreed and cannot by analogy generate a power to enter judgment for other common law damages. If the legislature had intended to constitute Commission as an additional court for adjudicating damages it would have so stated."

These cases indicate that even when the legislature is fairly explicit about the meaning of "affirmative action," a monetary damage remedy is not to be lightly implied. Those cases that have implied the existence of such a damage remedy have involved statutory language plainly indicative of a legislative intent to authorize monetary awards. No court, however, without more statutory direction, has construed the bare words, "affirmative action as will effectuate the purposes" of the statute, as set forth in § 14(e), to authorize a monetary award.

In *Mendota Apartments* v. *D. C. Commission on Human Rights*, 315 A.2d 832, 836 (D.C. 1974), the District of Columbia Court of Appeals, viewing language identical to that contained in § 14(e) held:

> "If the Commissioners had intended to give the Commission the extraordinary and unusual power to award damages, surely they would have said so in express words, specifying the basis on which damages could be awarded and some limitation on the amount that could be allowed. In our opinion the authority to order a respondent to 'take such affirmative action as will effectuate the purposes of this Article' did not include the authority to award civil damages. . . ."[8]

See also Murphy v. *Industrial Commission*, 37 Wis.2d 704, 157 N.W. 2d 568 (1968), where the Supreme Court of Wis-

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[8] The District of Columbia statute now in force specifically authorizes the Commission to award compensatory damages.

consin held that the State Fair Employment Practices Act did not authorize a back pay award.[9]

We do not think that the General Assembly of Maryland, in enacting § 14(e), intended that the Commission be empowered to make any monetary awards for compensatory or other damages.[10] In so concluding, we note that throughout its 47-year history, the Commission has seen its powers ebb and flow almost as many times as its name has been changed. In 1927, the Interracial Commission was created "to consider questions concerning the welfare of colored people residing in the State of Maryland, recommend legislation and sponsor movements looking to the welfare of said people, and to the improvement of interracial relations, and to cooperate with other State agencies to these ends." Chapter 559 of the Acts of 1927. The Commission was also empowered to make by-laws and regulations and was vested with "full and plenary powers to investigate interracial conditions and to promote the welfare of the colored race and the betterment of interracial relations." In 1943, the Interracial Commission became the "Commission to Study Problems Affecting the Colored Population," and was at the same time divested of its specific power to investigate interracial conditions, recommend legislation, make regulations and "sponsor movements." See Chapter 431 of the Acts of 1943. The Commission was authorized by that act only "to make such surveys and studies concerning colored problems and interracial conditions as it may determine and shall have full power and

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[9] The Wisconsin statute provides:

> "If, after hearing, the commission finds that the respondent has engaged in discrimination, the commission shall make written findings and recommend such action by the respondent as will effectuate the purpose of this subchapter. . . ."

[10] No question is raised in this case concerning the constitutionality of authorizing an administrative agency to make monetary awards. *See* County Council v. Investors Funding, 270 Md. 403, 312 A.2d 225 (1973).

authority to promote, in every way possible, the welfare of the colored race and the betterment of interracial relations." In 1951, this body became the "Commission on Interracial Problems and Relations" and reacquired the power to recommend legislation. See Chapter 548 of the Acts of 1951. But once again its powers were seemingly curbed as its authority "to promote the welfare of the colored race and the betterment of interracial relations" was specifically tied to its study and survey functions. In 1960, this restriction was dropped, but at the same time the clause was confined to promoting the betterment of interracial relations. See Chapter 100 of the Acts of 1960. It was not until 1963 that the Commission was given enforcement powers—coincidental with the state ban on racial discrimination in places of public accommodation. Chapters 227 and 228 of the Acts of 1963. Although the Commission's jurisdiction was later extended to cases involving discrimination in employment (Chapter 717 of the Acts of 1965) and discrimination in housing (Chapter 324 of the Acts of 1971) and its general powers were augmented to a degree in 1968[11] and 1969,[12] its enforcement provisions have remained generally unchanged.[13]

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[11] In 1968, the Commission on Interracial Problems and Relations became the Human Relations Commission, Chapter 83 of the Acts of 1968, and acquired the power, reminiscent of the 1927 law, to hold an investigatory hearing whenever any problem of racial discrimination arose. Chapter 464 of the Acts of 1968. The original version of this bill gave the Commission itself the power to petition an equity court to secure compliance with its recommendations, but this provision was eliminated from the final enactment.

[12] In 1969, the Commission, rather than the State's Attorney, was given the authority to seek court enforcement of its orders. Chapter 153 of the Acts of 1969.

[13] Chapter 408 of the Acts of 1972 modified the Commission's hearing procedures. Provisions in the bill originally which would have empowered the Commission to make regulations and to a degree insulated its orders from judicial review were stricken from the final enactment. Chapter 408 of the Acts of 1972.

In view of the Commission's legislative background, the failure of § 14(e) to specifically authorize an award of compensatory damages, the unlikelihood of a legislative grant of unbridled power to an administrative agency to make monetary awards without guidelines or limitations, and the cited cases, we conclude that the Commission's order granting Gutwein six weeks' loss of pay and moving expenses was plainly beyond its power and jurisdiction.

ORDER OF THE CIRCUIT COURT FOR TALBOT COUNTY REVERSING THE ORDER OF THE COMMISSION ON HUMAN RELATIONS REVERSED; THAT PART OF THE COMMISSION'S ORDER AWARDING MONEY DAMAGES VACATED; EACH PARTY TO PAY OWN COSTS.

APPENDIX D

Excerpts from Petitioner's Brief Before the Maryland Court Raising Federal Questions

* * * * * * * * * *

Courts have also recognized the implicit authority and the constitutional duty of state and local civil rights agencies to award adequate remedies. *State of Minnesota* v. *Bergeron, supra; Gilliam* v. *City of Omaha,* 331 F.Supp. 4 (1971) *rev'd on other grounds,* 459 F.2d 63 (5th Cir. 1972). In the face of the indisputable national and state policies to eliminate discrimination, failure or refusal of the Commission or Court to identify and demand those actions necessary to eliminate discrimination constitutes state encouragement of such unlawful practices. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961); *State of Minnesota* v. *Bergeron, supra.* The Supreme Court has made clear its mandate in race discrimination cases:

> [T]he court has not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar discrimination in the future. *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965). [Emphasis added].

Nothing contained in Art. 49B suggests a restrictive view should be taken of the Commission's remedial authority. Indeed, analogous decisions of other states and the federal courts indicate the contrary. Therefore, the Commission's authority to award back pay as compensatory damages in an employment discrimination case should be upheld. [pp. 20-21]

APPENDIX E

Excerpts from the Maryland Fair Employment Practices Act, Art. 49B, Md. Code Ann. (1957, 1973 Supp.)

[Substantive Provisions]

DISCRIMINATION IN EMPLOYMENT

Sec. 17. *Declaration of Policy*

It is hereby declared to be the policy of the State of Maryland, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and the promotion of the State's trade, commerce and manufacturers to assure all persons equal opportunity in receiving employment and in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, or age, and to that end to prohibit discrimination in employment by any person, group, labor organization, organization or any employer or his agents.

* * *

Sec. 19. *Unlawful employment practices*

(a) It shall be unlawful employment practice for an employer:

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, age or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of the individual's race, color, religion, sex, age or national origin.

* * * * * * * * * *

[Remedial Provisions]

* * *

Sec. 14.

(e) Cease and Desist Order—If upon all the evidence, the Commission finds that the respondent has engaged in any discriminatory act within the scope of any of these subtitles, it shall so state its findings. The Commission thereupon shall issue and cause to be served upon the respondent an order requiring the respondent to cease and desist from the discriminatory acts and to take such affirmative action as will effectuate the purposes of the particular subtitle.

APPENDIX F

Excerpts from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1970) as amended by the Equal Opportunity Act of 1972, 86 Stat 103 (1972).

[Substantive Provisions]

Sec. 703. *Discrimination because of race, color, religion, sex, or national origin.*

(a) It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • •

[Procedural Provisions, Emphasis Supplied]

Sec. 706.

• • •

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, *or by a member of the Commission,* alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. *In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law* pursuant to the requirements of subsections (c) and (d) . . . .

• • •

(c) In the case of an alleged unlawful employment practice occurring in a state, or political subdivision of a state, which has a state or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a state or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such state or local law. If any requirement for the commencement of such proceedings is imposed by a state or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate state or local authority. [As amended March 24, 1972, P.L. 92-261, Sec. 4].

APPENDIX G

United States Constitutional Provisions

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [Article VI, Cause 2].

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Fourteenth Amendment, Section 1].

APPENDIX H

Complaint of Discrimination in Employment

(Under Provisions of Article 49B, Annotated Code of Md.)

The act of discrimination must be based on race, color, religious creed, sex or national origin.

Name *Paul D. Gutwein* (Telephone (*none*)

Address *Box 278 C, RFD 4*

City—*Easton* State—*Maryland* Zip Code *20601*

Name of Company, Labor Organization, or Employment Agency Involved—*Easton Publishing Company*

Exact Date of Discrimination *8/11/69*

Address *Hanson Street, Easton, Maryland*

Discrimination for ☒ Race or Color

What did it involve? ☒ Termination

Have you filed a complaint with a Federal, State or Local Agency? Check Yes ☐ or No ☒

The Complaint: Tell the full story of this act of discrimination. Show all dates, places, and the names and titles of persons involved.

In the spring and early summer of 1969, I was living in Francisville, Indiana and engaged in writing mostly poetry and music. In the early part of July, I was visiting my fiancee in the District of Columbia and noticed in the Washington Post an ad placed by the Easton Publishing Company, the publisher of the Easton Star Democrat newspaper

indicating a vacancy for a reporter. Since I was quite low on funds at the time and anxious to obtain employment, and since the job of a newspaper reporter seemed to square with my interest in writing, I submitted a resume, and later was granted an interview in Easton, Md., by a Mr. Montgomery who is now the editor of the Easton Star Democrat. Mr. Montgomery offered me a job with the newspaper and I accepted it. Thereupon, I returned to Francisville, Indiana, purchased a truck for the purpose of transporting my belongings from Indiana to Maryland, and returned to Easton in the truck with my belongings at considerable expense. On or about August 4th, 1969, I entered into the performance of my duties for the Easton Publishing Company. Mr. Montgomery was aware, when he employed me, that I was engaged. He was not aware, nor did he inquire of me, as to the race or color of my fiancee. It happens that she is black and I am white. Prior to beginning my job in Easton, I had leased a dwelling in Talbot County for a period of one year. In a chance encounter with my landlord, he discovered that my fiancee was black, and raised some question as to whether or not I could continue to occupy the leased premises. I discussed this incident with Mr. Montgomery, and shortly after he learned of the fact that my fiancee was black, he informed me that I would no longer be of any value to the Easton Publishing Company as a reporter, because once people in the community learned of my fiancee's race, no one would talk to me and I would be unable to perform my duties. He thereupon advised me that my appointment was terminated, although I am being permitted to continue work on a temporary basis while trying to find another job. I was advised of the termination of my employment on August 11th, 1969. It was made very plain to me that the reason for the termination of my employment was that my fiancee is black and I am white. At the time of the termination of my employment, the Easton Publishing Company employed approximately fifty-two employees and had employed at least twenty-five or more em-

ployees for each working day in each twenty or more calendar weeks in the current or preceeding calendar year. The Easton Publishing Company is engaged in industry, namely, the publication of the Easton Star Democrat newspaper, certain job printing activities and the printing of some twenty-three other newspapers.

No civil or criminal action based on the allegations set forth in this complaint have been instituted by the complainant in any court. I do hereby attest that I have read the foregoing complaint, know the contents thereof, in that the complaint is based upon my own personal knowledge except as to matters stated on information and belief, and that, as to those matters, I believe the same to be true.

/s/ PAUL D. GUTWEIN
Signature of Complainant

Sworn To and Subscribed:
Before me this 20th day
of August, 1969.

/s/ NORMA JEAN CARTER
Notary Public

(Seal)

My Commission Expires July 1, 1970.

[Italicized portion of complaint was completed by Mr. Gutwein].